

FILED BY CLERK

JUL 20 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0195-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
CHARLES FRANKLIN LONG,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2002002674

Honorable Roger Brodman, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Arthur Hazelton

Phoenix
Attorneys for Respondent

Kenneth S. Countryman, P.C.
By Kenneth S. Countryman

Phoenix
Attorney for Petitioner

K E L L Y, Judge.

¶1 In this petition for review from the trial court's denial of his petition for post-conviction relief, Charles Long contends the court erred in denying relief on his

claims of ineffective assistance of counsel and prosecutorial misconduct. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Following a jury trial, Long was convicted of reckless manslaughter and aggravated assault. He was sentenced to concurrent terms of imprisonment, the longest of which was six years. We affirmed the convictions and sentences on appeal, *see State v. Long*, Nos. 1 CA-CR 05-0728, 1 CA-CR 05-1038, ¶ 36 (memorandum decision filed Sept. 4, 2007), and Long subsequently sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court summarily denied the petition, and this petition for review followed.

¶3 Long argues the trial court erred in concluding he had failed to raise a colorable claim of ineffective assistance of counsel. The first basis of this claim was Long's counsel's request for admission into evidence of a clipboard, with various documents attached.¹ Included in these documents was a newspaper article that contained comments critical of Long.² Long's counsel had not reviewed the contents of the clipboard, was unaware of the article, and therefore unintentionally offered the article into evidence.

¹Although offered by Long's counsel, the clipboard was a state's exhibit.

²The charges against Long arose as a result of his conduct in operating a boot camp for troubled youth. The newspaper article contained a description of the program as well as positive and negative comments, including assertions that Long had "a criminal record" and that there was a "child-abuse case pending" in connection with a previous boot camp. The article also cited Long's denial of the child abuse allegation.

¶4 The jury discovered the article during deliberations, and one juror read it aloud. Long filed a motion for new trial and after a three-day evidentiary hearing, during which all twelve jurors testified, the court denied the motion, finding beyond a reasonable doubt that the article had not affected the verdict.

¶5 Long claims his counsel was ineffective in allowing the article to go to the jury and the trial court erred in concluding otherwise. To establish a claim of ineffective assistance of counsel, Long was required to show both that counsel's performance was deficient and that the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Failure to establish either element is fatal to a claim for relief. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶6 As the trial court correctly concluded, even assuming Long could show that counsel's failure to examine the exhibit before offering it into evidence constituted deficient performance, he has not established that prejudice resulted. Long offers only a speculative assertion that the article was "severely damaging to his case." *See State v. Rosario*, 195 Ariz. 264, ¶ 23, 987 P.2d 226, 230 (App. 1999) (to establish claim of ineffective assistance, petitioner must present more than "mere speculation" that prejudice resulted). Moreover, the court's conclusion that the article did not contribute to the verdict is amply supported by the record. During the three-day evidentiary hearing on Long's motion for new trial, eleven jurors testified they remembered the article but it had not affected their decisions. The remaining juror did not recall the article and stated it would not have influenced his decision in any event. The jurors also testified they had

not discovered the article until after they had decided guilt on both charges and only the issue of Long's level of culpability on the homicide charge remained. Therefore, we conclude the court did not abuse its discretion in determining that no prejudice had resulted from the jury's exposure to the article. *See Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d at 948.

¶7 Long next claims his counsel provided ineffective assistance because she did not interview or call several potential witnesses. The trial court rejected this claim as untimely, because it had been raised in a supplement. But it nevertheless noted that Long had failed to establish either prong of *Strickland* on this claim. On review, Long does not explain why he believes the court erred, but merely repeats the assertions he raised below. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain "[t]he reasons why the petition should be granted"). We agree with the court that Long failed to show "that a different result would have occurred if the witnesses had been interviewed, called as a witness or asked different questions." *See Strickland*, 466 U.S. at 689 (petitioner must overcome strong presumption counsel's decisions were tactical and strategic); *Rosario*, 195 Ariz. 264, ¶ 23, 987 P.2d at 230. Therefore, the court properly concluded that Long did not present a colorable claim of ineffective assistance of counsel. *See Salazar*, 146 Ariz. at 541, 707 P.2d at 945.

¶8 Finally, Long argues the prosecutor intentionally placed the article on the clipboard and, therefore, the trial court erred in denying relief on his claim of prosecutorial misconduct. But because Long raised, and we addressed, this claim on

direct appeal, *see Long*, Nos. 1 CA-CR 05-0728 & 05-1038, ¶ 25, it is precluded. *See* Ariz. R. Crim. P. 32.2(a)(2). Accordingly, although we grant review, we deny relief.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge